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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOHN ZARUBA, DuPage County Sheriff, in his official capacity and as agent of DuPage County Sheriff's Department,

Petitioner,

v.

JUNE FRANKLIN and KAREN HUFF,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Did the Seventh Circuit infringe on the sovereign right of the State of Illinois to determine its own structure of government by judicially declaring the existence of a suable governmental entity that is non-existent under the laws of the State of Illinois?

PARTIES TO THE PROCEEDINGS

Respondents June Franklin and Karen Huff brought this action against the DuPage County Sheriff, in his official capacity, and the DuPage County Sheriff's Department. Pursuant to Federal Rule of Appellate Procedure 43(c), current Sheriff John Zaruba was substituted for former Sheriff Richard P. Doria, Sr.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 150 F.3d 682 and is reprinted in the Appendix. (App. 1-6) The orders of the United States District Court for the Northern District of Illinois have not been reported. They are reprinted in the Appendix. (App. 7 and 9).

JURISDICTIONAL STATEMENT

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals for the Seventh Circuit entered judgment on July 17, 1998. (App. 1). Petitioner filed a Petition for Rehearing, which was denied on August 28, 1998. (App. 10). This Petition for *Writ of Certiorari* was filed within 90 days of the denial of the Petition for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article IV, §§ 1, 2 and 4; United States Constitution, Amendment X; United States Constitution, Amendment XI; United States Constitution, Amendment XIV, §§ 1 and 5; and 42 U.S.C. § 1983 are implicated in this case.

United States Constitution, Article IV, § 1:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. . . .

United States Constitution, Article IV, § 2:

> . . . A Person charged in any State with Treason, Felony, or other Crime, who shall flee from

> Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime. . . .

United States Constitution, Article IV, § 4:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion. . . .

United States Constitution, Article VI:

> . . . all executive . . . officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution. . . .

United States Constitution, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.

United States Constitution, Amendment XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or Subjects of any Foreign State.

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

> State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV, § 5:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

On March 9, 1996, Defendants Cook and Berry, both private bail bond agents,[1] asked Investigator Biles of the Aurora Illinois Police Department to help them apprehend Plaintiff June Franklin at her job in DuPage

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[1] Cook and Berry were employed by the Georgia Fugitive Apprehension Bureau which, despite its name, is not a public entity.

County, Illinois. Second Am.Compl. at pars. 15 and 17. After being apprised of this request, Corporal Guzlas, a DuPage County Illinois Deputy Sheriff, was dispatched to meet Defendants Cook and Berry at a gas station across the street from the Arby's restaurant where June Franklin was employed. Second Am.Compl. at par. 19. The Arby's restaurant was located in an unincorporated area of DuPage County just outside of the municipal boundaries of the City of Wheaton.

Corporal Guzlas accompanied Cook and Berry to the Arby's restaurant where they took custody of Plaintiff June Franklin. Second Am.Compl. at par. 21. Cook and Berry transported Franklin to Aurora where they then solicited the assistance of Aurora officers in the apprehension of Plaintiff Karen Huff. Second Am.Compl. at pars. 22 and 27. Aurora and DuPage County authorities allegedly permitted Cook and Berry to remove plaintiffs from the scene of Huff's arrest without police escort or assurance that plaintiffs would be taken to Kane County, Illinois for extradition proceedings. Second Am. Compl. at par. 35. Plaintiffs allege that Defendants Cook and Berry subsequently removed them from the state, threatened them with physical harm and sexually assaulted them. Second Am.Compl. at pars. 47-53.

Plaintiffs filed a federal civil rights action against the DuPage County Sheriff's Department and the Sheriff, solely in his official capacity as Sheriff for the Sheriff's Department, alleging that the sheriff failed to train and supervise his deputy and he failed to have in place policies and procedures to insure that citizens apprehended by his deputy or with his deputy's assistance are safeguarded and processed according to law. Second Am.Compl. at pars. 11, 13 and 67.

In the District Court, Petitioner moved to dismiss the DuPage County Sheriff's Department on the grounds that it is not a suable entity under Illinois law. Additionally, Petitioner asserted sovereign immunity and moved to dismiss the official capacity claims against the DuPage County Sheriff based on the considerations set forth in *McMillian v. Monroe County, Alabama,* 520 U.S. 781 (1997). The District Court granted Petitioner's motion to dismiss the DuPage County Sheriff's Department. (App. 7). However, Petitioner's motion to dismiss the official capacity claims on grounds of sovereign immunity was denied. (App. 9).

Petitioner immediately appealed the denial of sovereign immunity to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the denial of sovereign immunity on July 17, 1998. (App. 1-6). In its Opinion, the appellate court recognized that the Illinois Supreme Court "has held that counties may not be held liable under *respondeat superior* for the actions of their sheriffs. . . ." (App. 5). Referring to its own prior decisions in *Ryan v. County of DuPage,* 45 F.3d 1090 (7th Cir. 1995) and *Thompson v. Duke,* 882 F.2d 1180 (7th Cir. 1989), *cert. denied,* 495 U.S. 929 (1990), the appellate court conceded that an Illinois sheriff is not a policymaker for the county. (App. 5). Though the court of appeals thus held that the County of DuPage could not be held liable for actions of the sheriff, it nonetheless rejected the contention that the Sheriff was a state officer entitled to sovereign immunity in his official capacity. The court of appeals rested its declination of immunity on language it has used in its own prior decisions that "the sheriff is an agent of the sheriff's department, an independently

elected office that is not subject to the control of the county. . . ." (App. 5). The appellate court further reasoned that "[a]lthough the relationship between county boards and county sheriffs is a complicated one, the relevant feature of that relationship for purposes of this case is the lack of any suggestion that the sheriff is an agent of the state in performing general law enforcement duties." (App. 6) Thus, the court found that the Sheriff's Department was a properly suable entity for purposes of fixing liability under *Monell v. New York Dept. of Social Servs.*, 436 U.S. 658 (1978). (App. 6). The Petitioner filed a timely petition for rehearing before the Seventh Circuit, which was denied on August 28, 1998. (App. 10).

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit Infringed On The State Of Illinois' Sovereign Right To Determine Its Own Structure Of Government By Judicially Declaring The Existence Of A Suable Governmental Entity Which Is Nonexistent Under The Laws Of The State Of Illinois.

The Seventh Circuit's proclamation that the Sheriff's Department is a suable *Monell* entity violated principles of federalism in at least three important respects. First, it undermines Illinois sovereignty by declaring the existence of an entity which is non-existent under Illinois law. Second, the court of appeals' recognition of a suable sheriff's department impermissibly negated the Illinois Supreme Court's holding that Illinois Counties may not be held liable for the actions of the Sheriff. *Moy v. County of Cook,* 159 Ill.2d 519 (1994). Third, by

creating a suable sheriff's department, the court of appeals disregarded, without discussion, a myriad of Illinois statutory provisions establishing, under the approach mandated in *McMillian v. Monroe County, supra,* that Illinois Sheriffs are state officers who cannot be sued in their official capacities consistent with the Eleventh Amendment.[2] The Seventh Circuit's circumvention of *McMillian* is conspicuous since this Court recognized that an "Illinois sheriff does not set county policy. . . ." *McMillian,* 117 S.Ct. at 1742, nt. 10, *citing Thompson v. Duke, supra.*

A. The Designation Of The Sheriff's Department As A Suable Entity Violated Principles Of Federalism Because No Such Entity Exists Under Illinois Law.

Under our system of federalism there exists an indestructible sovereign federal government which is comprised of indestructible sovereign states. "It is incontestable that the Constitution established a system of 'dual sovereignty.' *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990)." *Printz v. U.S.,* 521 U.S. 98,

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[2] As set forth in *Kentucky v. Graham*, 473 U.S. 159, 165 (1985), a suit against a governmental officer in his official capacity is suit against the entity of which the officer is an agent. "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Id.* If the DuPage County Sheriff had been determined to be a state official, the official capacity claims against him would have been barred by the Eleventh Amendment, *McMillian v. Monroe County, Ala.*, 520 U.S. 781 (1997).

117 S.Ct. 2365, 2376 (1997). "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), quoting *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869)." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

In *Monell,* this Court recognized that Congress' concerns of federalism were of great significance at the time that the civil rights act was adopted in 1871. In a passage which foreshadowed the instant dispute, the Court quoted the position of Representative Blair at length, which in pertinent part is as follows:

> . . . [T]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, . . . where [will] its power . . . stop and what obligations . . . might [it] not lay upon a municipality. . . .

Id., 436 U.S. at 674.

Representative Blair's views were reflective of those of the framers, expressed succinctly by James Madison in The Federalist No. 45:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary

> course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

It was against this backdrop of a belief in a federalist system, that the Tenth Amendment to the Constitution was adopted in 1791. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." U.S. Const., Amend. X. Though the broad rights granted to the states were tempered by the adoption of the Fourteenth Amendment, this Court's precedents, too numerous to mention, lay testament to the continued federal deference accorded the independence of state government, as embodied in the doctrine of our federalism.

These principles of federalism are at the root of several of this Court's decisions in the area of municipal liability under § 1983. For instance, *Monell* itself was predicated on the notion that creation of *respondeat superior* liability under § 1983 would constitute an unacceptable intrusion into the operation of state government. 436 U.S. at 691. More recently, the Court summarized the need for federal restraint in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

> In *Monell*, this court recognized that Congress had concerns regarding its constitutional authority to require local units of state government to keep the peace. *Monell*, 436 U.S. at 673. In *Monell*, the court reviewed Congress' rejection of the proposed Sherman Amendment, which would have imposed liability on municipalities for the acts of third parties. Congress rejected the Sherman Amendment because, in its view, "the Federal Government could not

> constitutionally require local governments to create police forces. . . ."

Id., 491 U.S. at 65. Certainly, the States have the sovereign right to determine their own structure of government. Many of the states, including Illinois, have a long historical precedent in the manner and methods they use to enforce their laws and perform the executive functions of the state—they vary from state to state and are rooted in the history of their early settlers. If a State chooses to administer its laws through officers and agencies that do not have a legal corporate existence independent of the State, a Federal Court lacks the authority to declare the existence of an independent suable entity for purposes of imposing Monell liability. *Id.* (holding that the Michigan Department of State Police is not a suable entity under Section 1983).

All of the requirements imposed by Congress in Section 1983 must be strictly adhered to. Otherwise, the rights of the states under our system of federalism will be jeopardized and the decisions of our lower federal courts will be in excess of their jurisdiction. For example, in *Board of County Comm'rs of Bryan County, Okl. v. Brown*, 117 S.Ct. 1382 (1997), this Court recognized that the failure to adhere to the causation requirement of Section 1983 had federalism implications.

> As we recognized in Monell and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless deliberate action attributable to the municipality directly caused a deprivation of federal rights. A failure to apply stringent culpability and causation requirements raises serious federalism concerns. . . .

Id., at 117 S.Ct. at 1394.

These federalism concerns also require a careful analysis of state law as a precondition to the designation of a suable entity in a § 1983 case against state officers with limited territorial jurisdiction. Such an analysis in this case would have established three controlling points, as developed below: (1) that the Illinois Supreme Court had rejected the notion of county liability for a sheriff's acts; (2) there is no independent suable entity known as the "sheriff's department"; and (3) under Illinois law, sheriffs are state officers. Because the Seventh Circuit failed to consider whether the "Sheriff's Department" existed as a suable entity under state law, it follows that the court's decision neither avoided federalism concerns nor preserved the sovereign rights of the State of Illinois.

B. The Seventh Circuit's Recognition Of A Suable Sheriff's Department Impermissibly Negated The Illinois Supreme Court's Holding In *Moy v. County Of Cook* That Illinois Counties May Not Be Held Liable For Actions Of Illinois Sheriffs.

In *Moy v. County of Cook, supra,* the Illinois Supreme Court held Illinois sheriffs are independent constitutional officers who are not subject to the control of the county, that Illinois sheriffs are not agents of the county, and that Illinois counties cannot be held liable under *respondeat superior* for the actions of a sheriff. While paying lip service to *Moy's* holding that an Illinois sheriff does not act on behalf of the county when engaged in law enforcement functions, the Seventh Circuit nonetheless circumvented congressional intent by declaring the existence of a "sheriff's department" for the purpose of imposing *Monell* entity liability. (App. 5).

Because, as we explain below, the sheriff's department has no existence under Illinois law, the lower court's declaration, in essence, negated *Moy*; and, thereby, exceeded the constitutional limitations on federal intrusion into state government under the Tenth Amendment. The Seventh Circuit essentially viewed the Illinois Supreme Court's seminal decision in *Moy* as a mere "wrinkle" in its path to finding the existence of a suable *Monell* entity. (App. 5).

C. There Is No Entity Known As The Sheriff's Department Under Illinois Law.

The appellate court's approach was a superficially appealing, yet structurally unsound circumvention of *Moy*. When this case was pending before District Court Judge Zagel, he recognized that the "Sheriff's Department" was not a suable entity and he entered an order dismissing it from the case. (App. 7) In a recent case involving an Indiana police department, the Seventh Circuit acknowledged: "The naming of the Town's Police Department as a defendant adds nothing; it is almost certainly not a suable entity separate from the Town." *West v. Waymire*, 114 F.3d 646 (7th Cir. 1997). Every other court that has considered whether a "sheriff's department" or "police department" is a suable entity under Illinois law has determined that they are not. *See, Foster v. Unknown Cook County Deputy Sheriff*, 914 F.Supp. 221, 224 (N.D.Ill. 1995); *Magnuson v. Cassarella*, 812 F.Supp. 824, 827-8 (N.D.Ill. 1992); *Jordan v. City of Chicago, Dept. of Police*, 505 F.Supp. 3-4 (N.D.Ill. 1980); *Mayes v. Elrod*, 470 F.Supp. 1188, 1192 (N.D.Ill. 1979).

In *Magnuson,* the court stated:

> Cook County Sheriff's Police Department ("CCSPD") claims that it is a non-suable entity, and therefore must be dismissed from this case. The federal courts look to state law to determine if a defendant is amenable to suit. Fed.R. Civ.P. 17(b). To be sued in Illinois, a defendant must have a legal existence, either natural or artificial. *Jackson v. Village of Rosemont*, 180 Ill.App.3d 932, 937-38, 129 Ill.Dec. 670, 673, 536 N.E.2d 720, 723 (1st Dist. 1988). Illinois law provides that CCSPD is to be maintained as a "division" of the Sheriff of Cook County, consisting of deputy sheriffs charged with the duty of law enforcement. Ill.Rev.Stat. ch. 34, ¶ 3-7001 (1992). Further, a review of the Sheriff's responsibility over such deputy sheriffs reveals that CCSPD does not enjoy a separate legal existence apart from the Sheriff of Cook County, and therefore is not a suable entity.

Magnuson, 812 F.Supp. at 827-8.

An examination of the Illinois statute that created the division under the Sheriff known as the "County Police Department" shows irrefutably that no such entity by that name can be a suable entity under Illinois law. The statute states the following:

> § 3-7001. Maintenance of county police department. The Sheriff in each county having more than 1,000,000 inhabitants shall maintain a division to be known as the County Police Department and to consist of such deputy sheriffs charged with the duty of law enforcement in such county as may be selected as hereinafter provided.

55 ILCS 5/3-7001.[3]

It was only after this statute was enacted in 1963 that the phrases "sheriff's department", "sheriff's police department", and "county police department" began appearing in reported Illinois decisions. *See, e.g., Roberts v. Illinois Liquor Control Com'n*, 58 Ill.App.2d 171 (1st Dist. 1965) (first case referencing "sheriff's department"). For two equally compelling reasons, however, the use of such terms cannot create a suable entity with a relationship to the DuPage County Sheriff. First, DuPage County does not have in excess of one million inhabitants. Therefore, the term "County Police Department" cannot refer to an entity in DuPage County, since the statute only applies to sheriffs in counties with more than one million inhabitants.[4] Second, the term "County Police Department," as stated in the statute, merely refers to the name of a "division" that is to be maintained by the sheriff for purposes of identifying deputies that have been selected under the merit selection laws that are set forth in the statutes. The term "County Police Department" literally refers to

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[3] Cook County is the only county in Illinois that has over one million inhabitants.

[4] In 1967 the Illinois Legislature enacted the County Police Department Act which did apply to sheriff in counties with a population under one million. Ill.Rev.Stat., ch 125, par. 101 et seq. (repealed). However, the County Police Department Act was repealed and replaced by the Sheriff's Merit System Law in 1981. 55 ILCS 5/3-8001, et seq. The Sheriff's Merit System Law, which remains in effect, has no provisions pertaining to the maintenance of a division known as the "County Police Department" or "Sheriff's Department." The deputies that are appointed pursuant to the Sheriff's Merit System Law are merely referred to as sheriff's personnel. *Id.*

the deputies so selected. The term "County Police Department" does not refer to a governmental corporation with a capacity to sue and be sued. Clearly, when this court decided *Monell*, it did not envision a division comprised of subordinate state officers being held civilly responsible for policies made by their superior officer.

Article IV, Section 4 of the Constitution guarantees to each state a republican form of government. The method chosen by a state to provide for its representative form of government is its sovereign prerogative. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).[5] Illinois has chosen its own method of delegating its law enforcement powers throughout the state. It is the sovereign right of the state of Illinois to choose sheriffs as its law enforcement representatives within the boundaries of the counties from which they are elected. The federal courts are prohibited under our system of federalism from altering these state statutory schemes, by creating fictional entities for purposes of fixing official liability for sheriffs, to circumvent the Eleventh Amendment.

In *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70 (1989), this court stated the following when it prohibited a Section 1983 plaintiff from suing a state official in his official capacity:

> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.

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[5] In *Gregory*, this court upheld the Missouri Constitution's mandatory retirement provision in a challenge brought by Missouri state judges under the Federal Age Discrimination in Employment Act.

> . . . As such, it is no different from a suit against the State itself. . . . We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device.

Likewise, the Seventh Circuit cannot be permitted to circumvent congressional intent by permitting a Section 1983 plaintiff to merely tack on to its pleading the name of an entity that does not exist under state law. If the plaintiffs were prohibited from using the "official capacity" pleading convention and were required to name the governmental entity being sued, any subsequent judgment against the "Sheriff's Department" would be worthless. The Plaintiff would have no legal entity to turn to for satisfaction of such a judgment since no such entity exists under Illinois law. The sheriff would have no obligation to satisfy the judgment, nor would the county. Federal courts must rigorously restrict such artificial pleading devices in order to avoid federalism concerns.

D. The Seventh Circuit's Failure To Consider Whether Petitioner Was A State Officer, As Opposed To A County Officer, Deprived Petitioner Of Sovereign Immunity, In Contravention Of The Approach Mandated By *Mcmillian v. Monroe County, Alabama*, 117 S.Ct. 1734, 1737 (1997).

The question of whether an Illinois sheriff is a policymaker for the state or for the county is dependent on an analysis of state law. *McMillian v. Monroe County, Alabama,* 117 S.Ct. 1734, 1737 (1997). In *McMillian*, this court deemed it critically important that the Alabama Supreme Court determined that "Alabama counties are not liable under a theory of *respondeat superior*

for a sheriff's official acts that are tortious." *Id.*, at 1738-9. The Illinois Supreme Court has made the identical decision with regard to Illinois sheriffs. *Moy*, *supra*. Additionally, in the case below, the Seventh Circuit disregarded, without discussion, a myriad of Illinois statutory provisions that under the approach mandated in *McMillian* establish Illinois sheriffs as state officers. Notwithstanding the fact that the Illinois statutory scheme was fully set forth when this case was before the Seventh Circuit, the court inaccurately stated: "Although the relationship between county boards and county sheriffs is a complicated one, the relevant feature of that relationship for purposes of this case is the lack of any suggestion that the sheriff is an agent of the state in performing general law enforcement duties." (App. 6).

1. The Illinois Supreme Court Has Declared That An Illinois County Cannot Be Held Liable Under *Respondeat Superior* For The Actions Of A Sheriff.

In *Moy v. County of Cook, supra,* the Illinois Supreme Court recognized that Illinois sheriffs are independent constitutional officers who are not subject to the control of any unit of local government. "Clearly, the sheriff's statutory duties . . . are independent of and unalterable by any governing body." *Moy*, 159 Ill.2d at 527. The court held that an Illinois sheriff is not an agent of the county, and the county cannot be held liable under *respondeat superior* for the actions of the sheriff.[6] As a

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[6] *Moy* overruled a lower Illinois appellate court that held that an Illinois county would be liable for the actions of the sheriff,

(continued...)

result of its holding in *Moy*, the Illinois Supreme Court affirmed the dismissal with prejudice of all of the claims brought against the county, including a Section 1983 claim.[7] The Illinois Supreme Court's decision that interprets Illinois law is more than a "wrinkle" to be ignored—it is entitled to deference by all federal courts.

2. Under Illinois Statutes, Sheriffs Act As State Law Enforcement Officials.

This Court has recognized that the "actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law." *McMillian*, 117 S.Ct. at 1737. However, this Court clearly rejected the acceptance of labels or nomenclature as a means of determining an Alabama sheriff's relationship to the state. In *McMillian*, the court stated: "[O]ur inquiry is dependent on an analysis of state law. . . . This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy." *Id.*, 117 S.Ct. at 1737.

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[6] (...continued)
notwithstanding the fact that Illinois sheriffs are independent constitutional officers who are not subject to the control of the county. *See Moy*, 159 Ill.2d at 524-5, *overruling Holda v. County of Kane*, 88 Ill.App.3d 522 (1980).

[7] The fact that a Section 1983 claim was affected by the Illinois Supreme Court's decision is more clearly set forth in the opinion published by the lower state appellate court, wherein the court stated: "[T]he circuit court correctly dismissed the Section 1983 count . . . ." *Moy v. County of Cook*, 244 Ill.App. 3d 1034, 1039 (1993).

a. Under Illinois Law, County Government Cannot Control Sheriffs.

In *McMillian*, 117 S.Ct. at 1739, this Court found that four provisions in the Alabama Code indicated that sheriffs were state officers. The same or substantially similar statutory provisions exist under Illinois law:

(1) Sheriffs are required to "attend upon" and "obey the lawful orders" of the state courts, 55 ILCS 5/3-6023;

(2) County treasurers lack authority over sheriffs, 55 ILCS 5/3-6018;

(3) The "powers and duties" of counties do not include any provision in the area of law enforcement, 55 ILCS 5/5-1005; and

(4) County boards cannot instruct the sheriff "how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime." 55 ILCS 5/3-6021 and 5/5-1087.

The sheriff's law enforcement duties are imposed upon him by the state. The Illinois Legislature has designated each sheriff as a "conservator of the peace in his or her county," and has imposed the duty upon sheriffs to "prevent crime and maintain the safety and order of the citizens of that county;" and has authorized sheriffs to "arrest offenders on view, and cause them to be brought before the proper court for trial or examination." 55 ILCS 5/3-6021. The Illinois Legislature requires sheriffs to serve, execute and return all warrants, process, orders and judgments that are legally directed to his or her attention. 55 ILCS 5/3-6019. The Illinois Legislature requires sheriffs to attend all courts and to obey all lawful orders and directions of the court. 55 ILCS 5/3-6023. The Illinois Legislature also

imposes the duty of the care and custody of the courthouse and jail upon the sheriff. 55 ILCS 5/3-6017. State law specifically imposes these duties, powers and function on sheriffs. Therefore, the county board lacks authority to alter them. 55 ILCS 5/5-1087. Furthermore, a county board cannot interfere with the internal operations of a sheriff's office. 55 ILCS 5/3-6018. However, by contrast, Illinois law does confer law enforcement power on cities and villages and their "corporate officers." 65 ILCS 5/3.1-15-25; 65 ILCS 5/11-1-1 and 11-1-2.

In his concurring opinion in *Monell*, Justice Powell recognized that Congress found it abhorrent to constitutional principles to place liability on municipalities for failing to maintain the peace when many of them did not have law enforcement powers under state law.

> The opposition in the House of Representatives focused largely on the Sherman amendment's attempt to impose a peacekeeping obligation on municipalities when the Constitution itself imposed no such affirmative duty and when many municipalities were not even empowered under state law to maintain police forces.

Monell, 436 U.S. at 706 (Justice Powell concurring). The distribution of law enforcement power under Illinois law is not unlike the structures of government that caused Congress to have federalism concerns at the time Section 1983 was enacted, in that not all units of local government have peace keeping power under Illinois law.

b. Under Illinois Law, Sheriffs Are Under The Control Of The State, State Agencies And Other State Officers When Exercising Law Enforcement Functions.

Under Illinois law, every sheriff is "commissioned by the Governor." 55 ILCS 5/3-6001. The state regulates and supervises Illinois sheriffs through state agencies and other state officers. Each year, sheriffs are required to participate in law enforcement training approved by the Illinois Law Enforcement Training Standards Board. 55 ILCS 5/3-6007. The Illinois Law Enforcement Training Standards Board was created by the State Legislature to "promote and protect citizen health, safety and welfare" and for the purpose of raising "the level of law enforcement by upgrading and maintaining a high level of training and standards for law enforcement executives, officers, county corrections officers, sheriffs, county coroners, and law enforcement support personnel . . . ." 50 ILCS 705/1. The Illinois Law Enforcement Training Standards Board reviews and approves training curriculum for all new officers and is mandated to include courses, refresher courses, and advanced training on the entire gamut of law enforcement duties performed by Illinois sheriffs. 50 ILCS 705/1; 50 ILCS 705/10.1. An officer must satisfactorily complete a course approved by the Illinois Law Enforcement Training Standards Board in order to be eligible for permanent employment. 50 ILCS 705/7(f).

Pursuant to the provision of the County Jail Act, 730 ILCS 125/1 et al., the sheriff is the warden of the county jail, 730 ILCS 125/2, he is responsible for the care of the prisoners, 730 ILCS 125/17, and he is responsible for keeping the jail in a clean and healthful condition,

730 ILCS 125/18. The jail is inspected annually by at least three members of the grand jury. The grand jury is required to report violations of the county jail act to the court. 730 ILCS 125/22. The sheriff is subject to a fine if he fails to comply with any of the provisions of the act. 730 ILCS 125/24.

The sheriff, in the operation of the jail, is also subject to comprehensive regulations imposed upon him by the State of Illinois Department of Corrections. 730 ILCS 5/3-15-2. At least once each year, the Department can inspect the jail for compliance with the standards established and the Department makes the results of the inspection available for public review. *Id.* If the jail is not brought into compliance with the Department's regulations, the Director of the Department can petition an appropriate court for an order requiring the jail to be brought into compliance. *Id.* The County Jail Standards that are promulgated by the Department of Corrections are set forth at 20 Ill. Admin. Code, Ch.I, Subch. F, pt. 701 et seq.

When a sheriff engages in misconduct, the county board has no recourse. However, a state's attorney can indict him and upon conviction the sheriff will be removed from office. 720 ILCS 5/33-3. If a prisoner is taken from the sheriff's custody and lynched, the governor may remove him from office. 720 ILCS 5/25/2. The removal statute is another example that the sheriff is under the control of the state and not the corporate authority of the county. The removal statute makes it clear that the chief executive officer of the municipality would remove a municipal officer in the case of a lynching. *Id.*

c. Under The Illinois Constitution, Sheriffs Are Considered State Officers.

Under the Illinois Constitution, the sheriff is considered a "holder of a State office" for the purpose of subscribing to the State's oath of office. Ill. Const. (1970), art. XIII, sec 3. Specifically, Article XIII, Section 3 of the Illinois Constitution provides:

> Each prospective holder of a State office or other State position created by this Constitution, before taking office, shall take and subscribe to the following oath or affirmation:
>
> > "I do solemnly swear (affirm) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of . . . to the best of my ability."

Each sheriff is required to take the State's oath of office pursuant to 55 ILCS 5/3-6004. This oath is also a requirement of Article VI of the United States Constitution which provides the following in pertinent part: "[A]ll executive . . . officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution. . . ."

Under the Illinois Constitution of 1818, the office of sheriff, along with the office of governor, was provided for under the Executive Article. Ill. Const. of 1818, art. III, sec. 11. Article III of the Illinois Constitution of 1818 stated the following, in pertinent part:

> Sec. 1. The executive power of the state shall be vested in a governor.
>
> . . .

> Sec. 11. There shall be elected in each and every county in the said state, . . . one sheriff and one coroner. . . .

Under the present Illinois Constitution, sheriffs "have those duties, powers and functions provided by law. . . ." Ill. Const. of 1970, art. VI, sec. 4(d). Additionally, Illinois sheriffs "have the duties, powers or functions derived from common law or historical precedent. . . ." *Id.* The duties imposed upon the sheriff by law, as shown above, and by historical precedent show that Illinois sheriffs function as an executive officers of the state.

The obligation of a state to deliver up a fugitive from justice arises under Article IV of the United States Constitution, which provides the following in pertinent part:

> Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceeding of every other State. . . .
>
> Section 2. . . . (2) A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

Any policy of the sheriff pertaining to the delivery of a fugitive from justice is clearly a policy enacted in furtherance of his duties as a constitutional officer of the State.

CONCLUSION

For the foregoing reasons, Petitioner Sheriff John Zaruba, in his official capacity as DuPage County Sheriff, respectfully submits that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-4132

JUNE FRANKLIN and KAREN HUFF,

Plaintiffs-Appellees,

v.

JOHN ZARUBA, DuPage County Sheriff,
in his official capacity and as an agent of
DuPage County Sheriff's Department, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 1453—**James B. Zagel**, *Judge.*

ARGUED JUNE 2, 1998—DECIDED JULY 17, 1998

Before FLAUM, MANION, and DIANE P. WOOD, *Circuit Judges.*

FLAUM, *Circuit Judge.* June Franklin and Karen Huff filed suit under 42 U.S.C. § 1983 against the DuPage County Sheriff,[1] in his official capacity only, seeking damages for injuries allegedly sustained while they were in the

---

[1] At the time the suit was filed, Richard Doria was the Sheriff of DuPage County. John Zaruba is the current Sheriff, and Zaruba is automatically substituted as the defendant under Federal Rule of Appellate Procedure 43(c).

custody of two deputy sheriffs. The complaint alleged that the Sheriff failed to train and supervise his deputies and that he failed to establish policies designed to safeguard citizens apprehended by the deputies. The Sheriff asserted Eleventh Amendment immunity, which the district court refused to grant on the basis that sheriffs in Illinois are county officials, not state officials.[2] The sole issue in this appeal is whether Sheriff Doria was acting as an agent of the state, in which case the Eleventh Amendment would bar the plaintiff's suit, or as the agent of some other governmental entity, in which case the Eleventh Amendment does not apply.[3] We have jurisdiction over an interlocutory appeal raising an Eleventh Amendment immunity defense under the collateral order doctrine pursuant to 28 U.S.C. § 1291. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993). For the reasons that follow, we affirm the decision of the district court.

We have previously held that sheriffs in Illinois are county officials and therefore generally do not receive immunity under the Eleventh Amendment. In *Scott v. O'Grady*, 975 F.2d 366, 370-71 (7th Cir. 1992), *cert. denied*, 508 U.S. 942 (1993), we analyzed the status of sheriffs un-

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[2] A suit against a governmental officer in his official capacity is really a suit against the entity of which the officer is an agent. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690 n. 55 (1978). The Eleventh Amendment, which bars suits for damages against states, therefore bars suits against state officials in their official capacities as well. However, the Eleventh Amendment does not extend to counties and similar municipal corporations. *See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

[3] Although none of the parties has raised the issue, we note that if the Sheriff were correct that he is an agent of the state, then the plaintiffs' § 1983 suit would have to be dismissed on the independent ground that neither states nor state officials acting in their official capacities are "persons" for purposes of § 1983. *See Will v. Michigan Dep't State Police*, 491 U.S. 58, 71 (1989).

der the Constitution, statutory code, and judicial decisions of Illinois and held that "when a county sheriff in Illinois performs his duties as the principal executive officer or chief law enforcement officer of the county, he acts as a county official and does not get the benefit of the Eleventh Amendment." *See also Gossmeyer v. McDonald*, 128 F.3d 481, 488 (7th Cir. 1997) (holding that a § 1983 suit against a detective in the Cook County Sheriff's Department in his official capacity is a suit against a county officer, not a state officer). Eleventh Amendment immunity will extend to county sheriffs, however, when the sheriff (although a county officer) exercises duties on behalf of the state. For instance, we afforded Eleventh Amendment immunity to the sheriff's deputies in *Scott* because they acted as agents of the state in executing a judicial Writ of Assistance that was issued by a state court. *See Scott*, 975 F.2d at 371. In this case, however, the Sheriff does not argue that the deputies who exercised custody over the plaintiffs were executing a state judicial order or performing any similar function for the state that would render them state agents for the limited purposes of that action. Nor does the Sheriff argue that formulating policies to govern the conduct of deputies in their law enforcement functions is an action on behalf of the state akin to enforcing a judicial writ. Rather, the Sheriff contests the general proposition established by *Scott* that sheriffs in Illinois are county officers, not state officers, when performing law enforcement functions.

A sheriff's status as a state or county official depends to a large extent on the definition of the sheriff's duties under substantive state law:

> [W]hether [a sheriff] represents the State or the county when he acts in a law enforcement capacity . . . is dependent on an analysis of state law. This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be depen-

> dent on the definition of the official's functions under relevant state law.

McMillian v. Monroe County, 117 S. Ct. 1734, 1737 (1997) (citations omitted). As noted, in *Scott* we analyzed the relevant Illinois law and concluded that Illinois sheriffs are county officers and not agents of the state when performing their typical law enforcement duties. The Sheriff's appeal is essentially a request to overrule *Scott*, and he points to two cases decided after *Scott* to support this course of action: the United States Supreme Court's decision in *McMillian*, *supra*, and the Illinois Supreme Court's decision in *Moy v. County of Cook*, 640 N.E.2d 926 (Ill. 1994). As discussed below, however, neither case warrants overruling our decision in *Scott*.

In *McMillian*, which involved a § 1983 suit against a county and the county sheriff in his official capacity, the Supreme Court analyzed the status of sheriffs under the law of Alabama and concluded that "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties." 117 S. Ct. at 1740. The Court was careful to note that its decision rested on a particularized inquiry into the duties and responsibilities of sheriffs under Alabama law, and it explicitly warned that this inquiry might yield different results in different states: "[S]ince it is entirely natural that both the role of sheriffs and the importance of counties vary from State to State, there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another." *Id.* at 1742. There are numerous differences between the law of Alabama and the law of Illinois, and we point to one that is particularly significant in distinguishing Alabama sheriffs from their Illinois counterparts: the treatment of those officials under the relevant state constitutions, as interpreted by the respective state supreme courts.

The Supreme Court noted that "critically for [its] case" in *McMillian*, the Alabama Supreme Court had previously held that the state constitution considered sheriffs to be

"executive officers of the state," such that counties could not be held liable under *respondeat superior* for the actions of their sheriffs. 117 S. Ct. at 1738-39 (citing *Parker v. Amerson*, 519 So. 2d 442, 444 (Ala. 1987)). In contrast, the Illinois Supreme Court has long held that sheriffs are county officers. *See Moy*, 640 N.E.2d at 929; *People ex rel. Davis v. Nellis*, 94 N.E. 165, 169 (Ill. 1911). Indeed, as we noted in *Scott*, 975 F.2d at 370, a sheriff's status as a county officer is explicitly stated in the Illinois constitution. *See* ILL. CONST. art. VII § 4(C).

One wrinkle in this analysis is that the Illinois Supreme Court, like the Alabama Supreme Court in *Parker v. Amerson*, has held that counties may not be held liable under *respondeat superior* for the actions of their sheriffs even though Illinois sheriffs are county officers. *See Moy*, 640 N.E.2d at 931. According to the defendant, if sheriffs in Illinois are not agents of the county for purposes of holding the county liable under *respondeat superior*, then sheriffs must therefore be agents of the state. This argument overlooks a crucial third possibility that we have found to be dispositive in other cases—namely, that the sheriff is an agent of the county sheriff's department, an independently-elected office that is not subject to the control of the county in most respects. For instance, in *Ryan v. County of DuPage*, 45 F.3d 1090, 1092 (7th Cir. 1995), we considered a § 1983 suit against the sheriff (of DuPage County, no less) that attempted to impose municipal liability on the County of DuPage, *see Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), for actions undertaken by the sheriff, the purported policymaker for the county. We affirmed the dismissal of the county as a defendant, holding that the sheriff is a policymaker for the county sheriff's office, not for the county itself. *Ryan*, 45 F. 3d at 1092 (describing Illinois sheriffs as "independently elected officials not subject to the control of the county"); *see also Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990). Given the important distinction between the general county government and the

county sheriff's office, *Moy*'s holding that the county is not liable under *respondeat superior* for the actions of the sheriff does not necessarily entail that the sheriff must necessarily be an agent of the state.[4]

Admittedly, sheriffs occupy a somewhat unique position under Illinois law. As *Moy* indicates, sheriffs are agents of the county, but they are separate from the county boards to such a degree that the county boards cannot be held liable for their actions under *respondeat superior*. Furthermore, as *Ryan* held, the lack of identity between the county sheriff's department and the general county government indicates that § 1983 suits against sheriffs in their official capacities are in reality suits against the county sheriff's department rather than the county board.[5] Although the relationship between county boards and county sheriffs is a complicated one, the relevant feature of that relationship for purposes of this case is the lack of any suggestion that the sheriff is an agent of the state in performing general law enforcement duties. Because the Sheriff was not acting as an agent of the state in this case, we affirm the judgment of the district court.

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[4] In fact, *Moy* did not reject *respondeat superior* liability for the county because the sheriff was not an agent of the county. Rather, the court denied liability only because the sheriff is the wrong *kind* of agent. The court distinguished county *employees*, who are closely controlled by the county board, from county *officers*, like the sheriff, over whom the county board has little control. The county board's *respondeat superior* liability, the court held, extended only to county employees and not to independent county officers. *See Moy*, 640 N.E.2d at 929-31. Thus, *Moy* is entirely consistent with our conclusion in *Scott* that sheriffs are agents of the county, rather than the state. *Moy* merely specified that the sheriff is a particular kind of county agent—*i.e.*, an officer rather than an employee.

[5] This is so even though the county board often has a statutory duty to indemnify the sheriff for damages awards. *See* 55 ILL. COMP. STAT. ANN. § 5/5-1002; *see also Tangwall v. Stuckey*, 135 F.3d 510, 514 n.9 (7th Cir. 1998).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK

Office of the Clerk
[August 20, 1997]

Thomas F. Downing
DuPage County State's Attorney's Office
505 North County Farm Road
Wheaton, IL 60187

Case No. 1:97-cv-01453 Title: Huff v. Doria

Assigned Judge: Honorable James B. Zagel

MINUTE ORDER of 8/20/97 by Hon. James B. Zagel: Defendants DuPage County Sheriff's Department and Sheriff Doria's motion to dismiss. Answer brief to motion due 09/10/97. Reply to answer brief due 09/24/97. Ruling on motion set for 10/01/97 at 10:00 a.m. [26-1] [11-1] Defendant DuPage County Sheriff's Department is dismissed pursuant to FRCVP 12(b)(1) and (6). terminating party DuPage Co Sheriffs The Aurora defendants are given leave to file an amended answer and until 09/17/97 to respond to the plaintiffs discovery. Mailed notice

This docket entry was made by the Clerk on August 21, 1997

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 97 C 1453 Date: November 13, 1997

Name of Assigned Judge: JAMES B. ZAGEL

Case Title: FRANKLIN v. DUPAGE COUNTY, *et al.*

* * * * *

DOCKET ENTRY:

* * * * *

(10) ☒ [Other docket entry] Defendant Doria's motion (44-1) to dismiss is denied.

(11) ☒ [For further detail see * * * ☒ order attached to the original minute order form.]

* * * * *

App. 9

ORDER

Franklin and Huff v. DuPage County

97 C 1453 Judge Zagel

Defendant Richard Doria, the Sheriff of DuPage County, now moves to be dismissed from this case on grounds that he is entitled to sovereign immunity under the Eleventh Amendment.

"[W]hen a county sheriff in Illinois performs his duties as the principal executive officer or chief law enforcement officer of the county, he acts as a county official and does not get the benefit of the Eleventh Amendment." *Scott v. O'Grady,* 975 F.2d 366, 371 (7th Cir. 1992). A county official can be considered a state official entitled to claim the immunity privilege if he or she acts as an arm of the Illinois state judicial system by executing state court orders. *Id.* Here, the activities that constitute the gravamen of Franklin and Huff's complaint relate to Doria's role in apprehending and arresting them. Creating policies regarding arrest and performing arrests are precisely the sort of executive, discretionary duties that the sheriff performs as a county official. *See Jackson v. Doria,* 851 F. Supp. 288, 290 (N.D. Ill. 1994) (Illinois sheriff acted as a county official in executing an arrest warrant). Therefore, Doria acted as a county, not state, official to the extent he had a role in plaintiffs' arrest and is not entitled to immunity in this regard.

I hereby deny the motion to dismiss Sheriff Doria on the grounds of sovereign immunity.

/s/ James B. Zagel

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

August 28, 1998

Before

HON. JOEL M. FLAUM, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. DIANE P. WOOD, Circuit Judge

JUNE FRANKLIN & KAREN HUFF,

Plaintiffs-Appellees,

No. 97-4132 v.

JOHN ZARUBA, DuPage County Sheriff,
in his official capacity and as an agent of
DuPage County Sheriff's Department,
et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 1453—James B. Zagel, *Judge*.

ORDER

On August 13, 1998, the defendants-appellants filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

Supreme Court, U.S.
FILED
DEC 29 1998
OFFICE OF THE CLERK

No. 98-893

In The

Supreme Court of the United States

October Term, 1998

JOHN ZARUBA, DuPage County Sheriff, in his official capacity,

Petitioner,

v.

JUNE FRANKLIN and KAREN HUFF,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Seventh Circuit properly affirm the District Court's ruling that under Illinois law county sheriffs are deemed county officers, not state officers, and thus not entitled to Eleventh Amendment immunity?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are the Respondents June Franklin and Karen Huff and the DuPage County Sheriff, in his official capacity. The DuPage County Sheriff's Department is not a party to this proceeding.

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CONSTITUTIONAL PROVISIONS:

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OPINIONS BELOW

The Order and Decision of the District Court denying Petitioner's Motion to Dismiss was entered on November 13, 1997. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the District Court's ruling was entered on July 17, 1998. Both decisions are included in the Appendix to the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment XI; Illinois Constitution, Article 5, Section 1; and Illinois Constitution, Article 7, Section 4 are involved.

United States Constitution, Amendment XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Illinois Constitution, Article 5, Section 1

> ARTICLE 5. THE EXECUTIVE
>
> SECTION 1. The Officers
>
> The Executive Branch shall include a Governor, Lieutenant Governor, Attorney General, Secretary of State, Comptroller and Treasurer elected by the electors of the State. They shall keep the public records and maintain a residence at the seat of government during their terms of office.

Illinois Constitution, Article 7, Section 4

ARTICLE 7. LOCAL GOVERNMENT

SECTION 4. County Officers

* * *

(c) Each county shall elect a sheriff, county clerk and treasurer and may elect or appoint a coroner, recorder, assessor, auditor and such other officers as provided by law or by county ordinance. Except as changed pursuant to this Section, elected county officers shall be elected for terms of fours years at general elections as provided by law. Any office may be created or eliminated and the terms of office and manner of selection changed by county-wide referendum. Offices other than sheriff, county clerk and treasurer may be eliminated and the terms of office and manner of selection changed by law. Offices other than sheriff, county clerk, treasurer, coroner, recorder, assessor and auditor may be eliminated and the terms of office and manner of selection changed by county ordinance.

STATEMENT OF THE CASE

Plaintiffs allege that on March 9, 1998, DuPage County Sheriff's deputy Corporal Dennis Guzlas assisted two individuals known to him to be bounty hunters in the apprehension of Plaintiff June Franklin. (Second Amended Complaint, p. 5, para. 12; p. 6, para. 21-22). Plaintiffs were then removed from the State of Illinois without an extradition hearing.

On the date of this incident, Richard Doria was the DuPage County Sheriff and was originally named as a Defendant, in his official capacity. (Second Amended Complaint, para. 13) After the date of this incident, the citizens of DuPage County elected John Zaruba as DuPage County Sheriff. Therefore, pursuant to federal rule of Appellate Procedure 43(c) Sheriff John Zaruba was substituted for former Sheriff Richard Doria.

Plaintiffs' allegations against the DuPage County Sheriff are that he failed to train and supervise his deputies and have in place policies and procedures to ensure that citizens apprehended by his deputies are safeguarded and processed according to law. Plaintiffs further allege the DuPage County Sheriff failed to have in place policies and procedures to ensure that outside agencies and/or persons who seek to apprehend Illinois citizens do so with proper authority and according to Illinois law. (Second Amended Complaint, para. 67)

Although Plaintiffs originally also named as a defendant the DuPage County Sheriff's Department, the District Court dismissed the DuPage County Sheriff's Department pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). (*See* Minute Order entered August 20, 1997, Appendix 7 to Petition for a Writ of Certiorari). The Order that dismissed the Sheriff's Department was entered before the District Court ruled on the Sheriff's sovereign immunity claim. (*See* Order entered November 13, 1997, Appendix 8 to Petitioner's Writ). In fact, the Sheriff's Department was dismissed before the sovereign immunity issue was fully briefed before the District Court.



REASONS FOR DENYING THE WRIT

Contrary to Petitioner's assertion, the Seventh Circuit did not rule that the DuPage County Sheriff's Department is a properly suable entity. Indeed, that issue was not even before that Court. Moreover, the issue in this case is not whether Sheriff Zaruba acts as an agent for the State of Illinois or for the County of DuPage. Respondents have not brought suit against the State of Illinois or the County of DuPage. Rather, Respondents have brought suit against John Zaruba, in his official capacity as the DuPage County Sheriff.

The issue ruled on by the Seventh Circuit, and the sole issue before this Honorable Court, is whether the DuPage County Sheriff (i.e. – the elected official) is a county officer or a state officer. If the DuPage County Sheriff is deemed a county officer under Illinois law, then he is not entitled to sovereign immunity. *See McMillian v. Monroe County, Alabama*, 520 U.S. 781, 117 S.Ct. 1734 (1997).

Prior to this case, the Seventh Circuit addressed this same issue and held that Sheriffs in Illinois are county officers, and as such generally do not receive sovereign immunity. *Scott v. O'Grady*, 975 F.2d 366, 370-71 (7th Cir. 1992), *cert. denied*, 508 U.S. 942 (1993). The analysis followed by the Seventh Circuit in *Scott v. O'Grady* is the same analysis this Court later applied in *McMillian*. This Court's analysis of this issue in *McMillian* focused first and foremost on the state constitution – "the supreme law of the state," and the interpretation given that constitution by the state supreme court. *Id.* at 1737-38. An examination of the Illinois Constitution and Supreme Court decisions reveals that under Illinois law, county sheriffs

are deemed county officers, not state officers. Therefore, the Seventh Circuit properly denied Petitioner's sovereign immunity claim.

I. THE ILLINOIS CONSTITUTION DESIGNATES COUNTY SHERIFFS AS COUNTY OFFICERS.

The Illinois Constitution provides that county sheriffs are "county officers." Article 7 of the Illinois Constitution addresses local government. Specifically, Article 7, Section 4 provides as follows:

> Section 4. County Officers
>
> * * *
>
> (c) Each county shall elect a sheriff, county clerk and treasurer and may elect or appoint a coroner, recorder, assessor, auditor and such other officers as provided by law or by county ordinance . . .

Notwithstanding his designation in the Illinois Constitution as a County Officer, Petitioner wants this Court to declare him an Executive Officer. However, the individuals identified as Executive Officers in the Illinois Constitution do not include county sheriffs. Article V of the Illinois Constitution addresses the Executive Branch. Specifically, Article V, Section 1 provides as follows:

> Section 1. The Officers
>
> The Executive Branch shall include a Governor, Lieutenant Governor, Attorney General, Secretary of State, Comptroller and Treasurer elected by the electors of the State. They shall keep the public records and maintain a residence at the seat of government during their terms of office.

The clear import is that the framers of the Illinois Constitution intended county sheriffs to be "county officers" not "state officers."

II. THE ILLINOIS SUPREME COURT HAS LONG HELD THAT COUNTY SHERIFFS ARE COUNTY OFFICERS.

The Illinois Supreme Court has long and consistently held that county sheriffs are county officers, not state officers. *See, e.g., People v. Nellis*, 94 N.E. 165, 169 (Ill. 1911); *Moy v. County of Cook*, 640 N.E.2d 926, 929 (Ill. 1994). In *Moy*, the issue before the Court was whether a county may be held vicariously liable for the conduct of a county sheriff. *Id.* at 927. The Illinois Supreme Court held that a county may not be held vicariously liable for a sheriff's conduct because the "sheriff is a county officer and, as such, is not in an employment relationship" with the county. *Id.* at 931. The *Moy* Court's holding that county sheriffs are included among those persons designated in the Constitution as "county officers" is the holding from *Moy* that is germane to the issue before this Court. Given the clear wording of the Illinois Constitution and the clear pronouncements of the Illinois Supreme Court, the Seventh Circuit properly affirmed the District Court's denial of Petitioner's Motion to Dismiss.

CONCLUSION

Petitioner has offered no compelling reasons for this Court to grant its Petition for Writ of Certiorari. The Seventh Circuit properly analyzed this issue under the framework set forth by this Court in *McMillian*, and ruled in harmony with Illinois law as provided by the Illinois Constitution and the Illinois Supreme Court. Therefore, Respondents, June Franklin and Karen Huff, respectfully request this Honorable Court deny the Petition for Writ of Certiorari submitted by Petitioner, John Zaruba, DuPage County Sheriff.

Respectfully submitted,

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